No. 90-1726

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM KUNTZ, III (in his personal capacity as co-executor of the estate of William Kuntz, Sr.), as a common shareholder of the Peter Kuntz Company, on its behalf, as a member of a class of shareholders and in his own right,

Petitioner,

v.

SHAWMUT BANK OF BOSTON, THE FIRST NATIONAL BANK OF CINCINNATI, THE CENTRAL TRUST BANK, THE SOCIETY BANK, THE MERCHANTS NATIONAL BANK & TRUST CO., BANK ONE DAYTON N.A., MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., *et al.*, and JANE or JOHN DOES 1-299,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THIRD DEPARTMENT OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK AND/OR JUDGE DOMINICK VISCARDI, NEW YORK SUPREME COURT, ESSEX COUNTY

BRIEF FOR RESPONDENT BANK ONE, DAYTON, N.A. IN OPPOSITION

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No. 90-1726

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM KUNTZ, III (in his personal capacity as co-executor of the estate of William Kuntz, Sr.), as a common shareholder of the Peter Kuntz Company, on its behalf, as a member of a class of shareholders and in his own right,

Petitioner,

v.

SHAWMUT BANK OF BOSTON, THE FIRST NATIONAL BANK OF CINCINNATI, THE CENTRAL TRUST BANK, THE SOCIETY BANK, THE MERCHANTS NATIONAL BANK & TRUST CO., BANK ONE DAYTON N.A., MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., *et al.*, and JANE or JOHN DOES 1-299,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THIRD DEPARTMENT OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK AND/OR JUDGE DOMINICK VISCARDI, NEW YORK SUPREME COURT, ESSEX COUNTY

BRIEF FOR RESPONDENT BANK ONE, DAYTON, N.A. IN OPPOSITION

Respondent Bank One, Dayton, N.A. ("Bank One")[1/] submits this brief in opposition to the petition for a writ of certiorari filed by petitioner William Kuntz, III.

Bank One and the other respondents have been subjected to litigation by petitioner on the claims asserted here since 1986 when he sued *pro se* in the district court in Manhattan. His claims were dismissed at the trial and appellate levels of the federal system and his petition for certiorari here was rejected as untimely. Petitioner then asserted the same claims in New York state court, which dismissed them on three independent, state law grounds: lack of standing, *res judicata* and failure to plead in compliance with state procedural law. That dismissal was affirmed on appeal and petitioner's motions for leave to appeal to the New York Court of Appeals were denied both by the intermediate appellate court and by the Court of Appeals itself. As he now presents himself before this Court, therefore, petitioner's claims have already been subjected to judicial scrutiny by two trial court judges (one federal, one state), eight appellate judges (three federal, five state), and, on the issue of whether his appeal merited further review, 12 state appellate judges (five in the intermediate court and seven in New York's highest court).

The instant petition should be denied because it raises no substantial federal question, and adequate and independent state grounds support the lower courts' decisions. The lower

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1/ Pursuant to Supreme Court Rule 29.1, respondent Bank One discloses that its parent company is Banc One Corporation and that it has no subsidiaries.

courts, moreover, properly dismissed petitioner's complaint on each of the three state law grounds.

STATEMENT OF THE CASE

Petitioner claims to be a stockholder of the Peter Kuntz Company (the "Company"). He alleges that the Company, an Ohio corporation, was the beneficial owner of interests in two Ohio banks -- North Central Mortgage Company ("North Central") and Scioto Savings and Loan Association ("Scioto"). Petitioner asserts that Bank One and the other respondents conspired to render North Central uncompetitive, thereby enabling one of the respondents to purchase the Company's interests in North Central and Scioto. This is alleged to have destroyed the value of the Company's stock with the result that the Company went into liquidation in July 1986 (JA75-77).[2/]

Petitioner purports to sue both as a shareholder of the Company and as co-executor of the estate of his grandfather, William Kuntz, Sr. (the "Estate") (JA75).[3/] It is alleged that one of the assets of the Estate was stock in the Company.

2/ Citations preceded by "P___" refer to pages of the Petition for a Writ of Certiorari; "A___" to the appendix to the Petition for a Writ of Certiorari; and "JA___" to the joint appendix submitted to the Appellate Division, Third Department.

3/ According to the petition's caption, petitioner sues "on [the Company's] behalf". The complaint, however, asserts no derivative claim (JA75). Similarly, although the petition states that Winters National Bank, a predecessor of Bank One, was a trustee of the Estate (P4-5), the complaint does not so allege (JA77).

Petitioner in his various capacities seeks damages of $1.62 billion, plus interest, "multiplied according to law" (JA79).

A. The Federal Court Action

In September 1986, petitioner, appearing *pro se*, brought an action in the United States District Court for the Southern District of New York against the same group of defendants (the "Federal Court Action"). The complaint alleged that the defendants, acting in concert, drove North Central into financial difficulty in order to force the Company to sell its interests in North Central and Scioto. Claims were asserted under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (1982) ("RICO"), and "a number of the securities laws," as well as pendent state law claims including breach of fiduciary duty (JA80-114).

The Federal Court Action was dismissed with prejudice on May 12, 1987 for, *inter alia*, lack of standing. Noting that petitioner's only injury was the loss of value of his Company stock, the district court held that any possible cause of action belonged to the corporation, and not the shareholder (A36e-37e). The court noted that the claims could be brought derivatively, but added that the requirements for such a suit had not been met (A37e-38e). The United States Court of Appeals for the Second Circuit affirmed unanimously in an unpublished order dated January 6, 1988 (A29e-30e). 841 F.2d 1116. A petition for a writ of certiorari was rejected as untimely by this Court on May 4, 1988 (JA149), and petitioner's application for a writ of mandamus directing the clerk to accept the untimely certiorari petition was denied on November 14, 1988. 488 U.S. 952.

B. The State Court Action

1. The Complaint

The present action was commenced in New York Supreme Court, Essex County by service of a summons with notice on August 9, 1988, followed by a complaint on August 22. The complaint is an abbreviated version of the dismissed complaint in the Federal Court Action. Again, petitioner pleads claims as a common shareholder of the Company and as co-executor of the Estate. As in the Federal Court Action, the complaint asserts that respondents, acting in concert, sought to injure North Central in order to force the sale of the Company's holdings in North Central and Scioto. The complaint alleges RICO violations and lists seventeen "unlawful acts" sounding in tort and breach of contract (JA74-79).

2. The Motions to Dismiss

On November 16, 1988, Bank One moved to dismiss the complaint. The grounds asserted were (1) lack of personal jurisdiction over Bank One, (2) lack of subject matter jurisdiction over the RICO claim,[4/] (3) *res judicata* based on the prior decision in the Federal Court Action, (4) lack of standing, (5) failure to plead fraud, undue influence or breach

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4/ This ground was abandoned following the decision of the New York Court of Appeals in *Simpson Electric Corp.* v. *Leucadia, Inc.*, 72 N.Y.2d 450, 530 N.E.2d 860, 534 N.Y.S.2d 152 (1988), which held that state courts have concurrent jurisdiction over RICO claims. (This Court reached the same conclusion in *Tafflin* v. *Levitt*, 110 S. Ct. 792 (1990).)

of trust with the requisite particularity, and (6) failure to state any claim on which relief may be granted (JA152-58). The other respondents also filed motions to dismiss urging many or all of the same grounds (JA33-151, 161-65).

Petitioner opposed the motions, arguing that he had standing and that the complaint was sufficient. He argued also that he should be permitted to amend the complaint after discovery (JA260-67).

3. The Decisions Below

On May 19, 1989, the Essex County Supreme Court (Viscardi, J.) granted Bank One's and the other respondents' motions to dismiss the complaint. The court reasoned that the only alleged injury was a decrease in value of the Company's stock, and held that petitioner lacked standing to assert this claim. The court held also that its decision, in any event, was governed by *res judicata* based on the final decision in the Federal Court Action. Finally, the court ruled that the complaint failed to plead its claims with sufficient particularity in violation of CPLR § 3013.[5/] The court did not reach two additional grounds for dismissal raised in Bank One's motion: (a) lack of personal jurisdiction, and (b) failure to plead fraud, undue influence or breach of trust

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[5/] CPLR § 3013 provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

with particularity in violation of CPLR § 3016. Leave to replead was not granted (JA26-32).[6/]

Following an unsuccessful motion for rehearing, petitioner appealed the Essex County Supreme Court's orders on each of the three grounds for dismissal, and requested, apparently in the alternative, that the orders be modified to dismiss the complaint without prejudice (A1d-28d). On July 12, 1990, the orders were unanimously affirmed by the Appellate Division, Third Department, on the opinion below (A1b-2b). 163 A.D.2d 697, 559 N.Y.S.2d 825. Leave to appeal to the New York Court of Appeals was denied, first by the Appellate Division on October 31, 1990, and then by the Court of Appeals on February 12, 1991 (A1a). 77 N.Y.2d 803, 569 N.E.2d 874, 568 N.Y.S.2d 15. There were no dissenters in either court.

6/ The decision of the Essex County Supreme Court, which is not included in the appendix to the Petition for a Writ of Certiorari, is attached as an appendix to this brief.

ARGUMENT

I.

THIS COURT LACKS JURISDICTION BECAUSE THE PETITION RAISES NO SUBSTANTIAL FEDERAL QUESTION AND ADEQUATE AND INDEPENDENT STATE GROUNDS SUPPORT THE LOWER COURTS' DECISIONS

A. The Petition Raises No Substantial Federal Question

Petitioner premises this Court's jurisdiction (P2), as he must, on 28 U.S.C. § 1257, which provides for certiorari review of final state court judgments where (1) the validity of a federal statute or treaty is drawn in question, (2) the validity of a state statute is drawn in question as repugnant to federal law, or (3) "any title, right, privilege, or immunity is specially set up or claimed" under federal law -- in short, where a federal question is raised. Because petitioner raises no substantial federal question in the petition at bar -- as indeed he did not at any stage of the state court proceedings below -- this Court lacks jurisdiction to grant the petition.

It is elementary that a substantial federal question must exist in order to invoke this Court's jurisdiction over a final state court judgment. 28 U.S.C. § 1257 (1988); *Zucht* v. *King*, 260 U.S. 174, 176 (1922); *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 311 (1902). Moreover, this Court does not consider federal questions that were not raised in the state court. *Webb* v. *Webb*, 451 U.S. 493, 496-97 (1981); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928).

Apart from its assertion of this Court's appellate jurisdiction, the petition at bar does not cite a single federal statute or constitutional provision; nor were any cited in the state court proceedings below. Petitioner asks this Court to review purely state law questions: (1) whether, under New York law, a shareholder has standing to sue where the only injury alleged is a diminution in the value of his stock, and (2) whether, under New York law, a prior judicial decision dismissing a claim for lack of standing has *res judicata* effect.[2/] Accordingly, this Court lacks jurisdiction over the instant petition.

[2/] Indeed, petitioner's complaint alleges only a single non-state law claim: RICO. Even if the petition could somehow be read to challenge the correctness of the lower courts' decisions with respect to the RICO claim, such a question would be insubstantial. RICO does not alter the traditional rule that a shareholder lacks standing to recover directly for the diminution in value of his or her stock. *Roeder* v. *Alpha Industries, Inc.*, 814 F.2d 22, 29-30 (1st Cir. 1987); *Rand* v. *Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2d Cir.), *cert. denied*, 479 U.S. 987 (1986); *In re Sunrise Securities Litigation*, 916 F.2d 874, 886-88 (3d Cir. 1990); *Adams-Lundy* v. *Association of Professional Flight Attendants*, 844 F.2d 245, 250 (5th Cir. 1988) (per curiam); *Rylewicz* v. *Beaton Services, Ltd.*, 888 F.2d 1175, 1179 (7th Cir. 1989); *Sparling* v. *Hoffman Const. Co.*, 864 F.2d 635, 640-41 (9th Cir. 1988); *Warner* v. *Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir. 1987). Similarly, RICO is not exempt from the usual principles of *res judicata*. *Saud* v. *Bank of New York*, 929 F.2d 916, 918-19 (2d Cir. 1991); *Howell Hydrocarbons, Inc.* v. *Adams*, 897 F.2d 183, 188 (5th Cir. 1990); *Mortell* v. *Mortell Co.*, 887 F.2d 1322, 1324-26 (7th Cir. 1989); *Pelletier* v. *Zweifel*, 921 F.2d 1465, 1500-02 (11th Cir. 1991).

B. Adequate and Independent State Grounds Support the Decisions Below

Even if a state court judgment raises a substantial federal question, this Court will not review it if the judgment rests also on an adequate and independent state ground. *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945); *Murdock* v. *Memphis*, 87 U.S. (20 Wall.) 590, 636 (1875). Here, the decisions below rested on three independent, state law grounds: lack of standing, *res judicata* and failure to plead with particularity. Petitioner challenges only the first two of these grounds. Accordingly, even if he raised a substantial federal question as to those, there would remain an adequate and independent state ground barring review by this Court.

II.

THE STATE COURT PROPERLY DISMISSED PETITIONER'S COMPLAINT BASED ON LACK OF STANDING, *RES JUDICATA* AND FAILURE TO PLEAD WITH PARTICULARITY

A. Petitioner Lacks Standing When His Only Injury is a Decline in Value of His Stock

The New York courts correctly held that petitioner lacks standing to assert the claims at bar because the only alleged injury is diminution in the value of Company stock. Citing *Fifty States Management Corp.* v. *Niagara Permanent Savings and Loan Association*, 58 A.D.2d 177, 179, 396 N.Y.S.2d 925, 927 (4th Dep't 1977), the trial court held that

> [t]he law is well settled that a shareholder has no right to bring an action in his own name and in his own behalf for a wrong committed against the corporation even though the particular wrong may have resulted in a depreciation or destruction of the value of the corporate stock . . . .

(JA30). *See also Abrams* v. *Donati*, 66 N.Y.2d 951, 953, 489 N.E.2d 751, 751, 498 N.Y.S.2d 782, 783 (1985) (mem.) ("For a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment . . . ."); *General Motors Acceptance Corp.* v. *Kalkstein*, 101 A.D.2d 102, 106, 474 N.Y.S.2d 493, 495 (1st Dep't 1984).

The petition at bar (like the briefs below) ignores completely the reasoning of the state court and the holding of *Fifty States Management Corp.* Instead, in what constitutes his entire discussion of the standing issue, petitioner "repeats previous submissions made in the courts below in that he relies on the judgment[s]" in two specified decisions (P13).

The first decision, *Independent Investor Protective League* v. *Time, Inc.*, 50 N.Y.2d 259, 406 N.E.2d 486, 428 N.Y.S.2d 671 (1980), permits initiation of a shareholder derivative action after the subject corporation has been dissolved and has distributed its assets. The second decision, *Xerox Corp.* v. *Genmoora Corp.*, 888 F.2d 345, 350-52 (5th Cir. 1989), involves the sufficiency of allegations of injury in a shareholder derivative action. Neither decision is in any way germane: in the case at bar, petitioner has not sued derivatively.

The other cases that petitioner cited below involve instances where shareholder claims were permitted in circumstances bearing no relation to the facts at bar. First, petitioner relied on cases involving dilution of shareholder voting rights -- *Eisenberg* v. *Flying Tiger Line, Inc.*, 451 F.2d 267 (2d Cir. 1971), and *Hammer* v. *Werner*, 239 A.D. 38, 265 N.Y.S. 172 (2d Dep't 1933). A claim of dilution belongs to the affected shareholder and not to the corporation, and therefore an individual action by the shareholder is allowed. In the present case, however, there is no such claim. The core allegation here is that respondents wrongfully caused the Company, of which petitioner was a shareholder, to sell its "crown jewels" at an unfair price. This had no impact on petitioner's voting rights in the Company.

Second, petitioner cited various cases in which defendant's actions were aimed at coercing the plaintiff to part with his or her stock -- *Von Au* v. *Magenheimer*, 126 A.D. 257, 110 N.Y.S. 629 (2d Dep't 1908), *aff'd*, 196 N.Y. 510, 89 N.E. 1114 (1909); *Ritchie* v. *McMullen*, 79 F. 522 (6th Cir.), *cert. denied*, 168 U.S. 710 (1897); *Vincel* v. *White Motor Corp.*, 521 F.2d 1113 (2d Cir. 1975); *Prince* v. *Gurvitz*, 37 A.D.2d 727, 323 N.Y.S.2d 861 (2d Dep't 1971); *Niles* v. *New York Central & Hudson River R.R. Co.*, 176 N.Y. 119, 68 N.E. 142 (1903). Again, however, that is not what is claimed in the present case. Petitioner does not allege that he was coerced to part with his stock in the Company, but rather that the Company was wrongfully deprived of assets. That is an injury to the corporate entity, not to the individual shareholder.

Finally, petitioner relied on cases permitting a shareholder to sue where the defendant owed him or her a special duty -- *Matter of Auditore*, 249 N.Y. 335, 164 N.E. 242 (1928); *Cutler* v. *Fitch*, 231 A.D. 8, 246 N.Y.S. 28 (4th Dep't 1930); *General Rubber Co.* v. *Benedict*, 215 N.Y. 18, 109 N.E. 96 (1915); *Ritchie* v. *McMullen*, 79 F. 522 (6th Cir.), *cert. denied*, 168 U.S. 710 (1897). Petitioner argued below that Bank One owed him such a duty -- presumably under Ohio estates law (Alf-10f) -- because it acted as co-executor of the estate of the Company's chairman. The complaint does not allege, however, that Bank One was co-executor (JA74-79), nor was this asserted in petitioner's opposition to the motions to dismiss (JA260-95). Moreover, the case at bar, unlike those cited by petitioner, contains no particularized claim of malicious motive by Bank One which, even assuming it was named in the complaint as co-executor, had no interest in the challenged conduct.

In short, the cases cited by petitioner both in this Court and in the New York courts do not call into question the lower courts' conclusion that the injury alleged here is corporate in nature and cannot be sued upon except derivatively.

B. Petitioner is Barred by *Res Judicata* from Relitigating the Issue of Standing

The lower courts ruled that the final decision in the Federal Court Action, which held that petitioner lacked standing because the only claimed injury was a decline in value of the Company's stock, had *res judicata* effect precluding relitigation of the issue (JA31). Because the case

at bar asserts the same claims against the same parties, the courts below were clearly correct.

Petitioner argues, as he did below, that a dismissal on standing grounds is not a decision "on the merits" and therefore lacks preclusive effect (P13).[8/] This is flatly wrong as a matter of New York law. In *Burns* v. *Egan*, 117 A.D.2d 38, 41-42, 501 N.Y.S.2d 742, 745-46 (3d Dep't), *appeal dismissed*, 68 N.Y.2d 806, 498 N.E.2d 435, 506 N.Y.S.2d 1034 (1986), *res judicata* was held to bar plaintiffs from relitigating the issue of standing in a second suit arising from the same set of circumstances. The court concluded that *res judicata* precluded relitigation despite the fact that a dismissal for lack of standing is not technically an adjudication on the merits. The New York Court of Appeals could, of course, have reviewed this holding by granting petitioner leave to appeal. It declined to do so.

The essential elements for the application of *res judicata* are all present in this case: the decision in the Federal Court Action is (a) a final decision, (b) by a court of competent jurisdiction, involving (c) the same parties, and (d) the same cause of action. *Israel* v. *Wood Dolson Co.*, 1 N.Y.2d 116, 118, 134 N.E.2d 97, 98, 151 N.Y.S.2d 1, 3 (1956).

[8/] Petitioner argued below that the federal ruling on standing is not controlling because state standing rules differ. State and federal decisions both hold, however, that a shareholder lacks standing when the only injury alleged is a decline in the value of stock. *Compare Fifty States Mgmt. Corp.* v. *Niagara Permanent Sav. & Loan Ass'n*, 58 A.D.2d 177, 179, 396 N.Y.S.2d 925, 927 (4th Dep't 1977) *with Rand* v. *Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2d Cir.), *cert. denied*, 479 U.S. 987 (1986).

Accordingly, under *Burns* v. *Egan*, the decisions below correctly held that petitioner is barred from relitigating the issue of standing.

C. The Complaint Fails to Plead the Material Elements of Any Cause of Action

Finally, the state court dismissed the complaint for failure to meet the threshold pleading standards set forth in CPLR § 3013, as construed in *Peri* v. *State of New York*, 66 A.D.2d 949, 411 N.Y.S.2d 709 (3d Dep't 1978), *aff'd on opinion below*, 48 N.Y.2d 734, 397 N.E.2d 1332, 422 N.Y.S.2d 665 (1979). The decisions below held that the complaint provided neither sufficient notice of the transactions or occurrences intended to be proved, nor the material elements of each cause of action (JA31-32). Petitioner does not challenge this ruling, which alone suffices to defeat the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
June 5, 1991

Respectfully submitted,

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APPENDIX

STATE OF NEW YORK

SUPREME COURT COUNTY OF ESSEX

WILLIAM KUNTZ, III, (in his personal capacity), WILLIAM KUNTZ, III, (Co-Executor of the Estate of William Kuntz Senior), WILLIAM KUNTZ, III, (As a Common Shareholder in the Peter Kuntz Company), WILLIAM KUNTZ, III, (As the Member of the Class of Shareholders),

Plaintiff,

-against-

THE SHAWMUT BANK OF BOSTON, and THE FIRST NATIONAL BANK OF CINCINNATI, and THE CENTRAL TRUST BANK, and, THE SOCIETY BANK, and MERCHANTS NATIONAL BANK & TRUST, and BANK ONE DAYTON, N.A., and MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., et al. and JANE OR JOHN DOES, 1-299,

Defendants.

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VISCARDI, J., The defendants in this action each seek an order to dismiss the complaint against them on various grounds.

The defendant, The Shawmut Bank of Boston ("Shawmut") seeks an order dismissing the complaint as against it pursuant to CPLR Section 3211, 3013 and 3016(b). The defendants, Star Bank, National Association, Cincinnati, The Central Trust Company, N.A., and Merchants National Bank & Trust Company of Indiana (collectively, "lending banks") seek an order dismissing the complaint on the grounds that the court lacks personal jurisdiction over the lending banks, the plaintiff lacks standing to maintain this action, the complaint fails to state a cause of action upon which relief can be granted and the plaintiff has failed to plead his claim with sufficient particularity. The defendant Society Bank, N.A. ("Society Bank") seek an order pursuant to CPLR Section 3211 dismissing the complaint on the grounds that the plaintiff lacks personal jurisdiction over the Society Bank because the plaintiff failed to acquire long arm jurisdiction and make proper service of process upon the Society Bank, that the Federal Courts have exclusive jurisdiction over "RICO" claims and thus the court lacks subject matter jurisdiction, that the plaintiff lacks the capacity to sue and that a shareholder of a company has no standing in bringing an action on his own behalf for diminution in the

value of his shares, and that the complaint fails to state a cause of action because the plaintiff has failed to plead the material elements of the causes of action and has failed to plead with particularity the circumstances constituting fraud. The defendant Bank One Dayton, N.A. ("Bank One") seek to dismiss the complaint pursuant to CPLR Section 3211 on the grounds of lack of personal and subject matter jurisdiction, res judicata, lack of standing, failure to plead fraud, undue influence or breach of trust with particularity, and failure to state a cause of action. The defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") seek an order dismissing the complaint pursuant to CPLR Section 3211(a)(7) upon the grounds that the complaint fails to state a cause of action.

The defendants have withdrawn their argument that this court lacks subject matter jurisdiction over plaintiff's RICO claim on the basis the Court of Appeals in *Simpson Electric Corp.* v. *Leucadia, Inc.*, 72 NY2d 450, decided October 25, 1988, held that state courts enjoy concurrent jurisdiction over civil RICO claims with the federal courts.

The plaintiff alleges that he is a New York resident and a shareholder of the Peter Kuntz Company ("Kuntz Company"). The Kuntz Company, a building supplies business, owned a majority interest of the share of two companies, the North Central Mortgage Company ("North Central") and Scioto Savings and Loan Association ("Scioto"). Plaintiff alleges that certain of the defendants formed a loan syndicate which loaned funds to North Central at higher rates than North Central could charge customers. As a result North Central suffered substantial losses which resulted in the sale of the Kuntz Company's interests in North Central and Scioto. It is further contended that the sale of

these entities facilitated the liquidation of Kuntz Company in July 1986.

Plaintiff further alleges that all of the defendants conspired to perpetrate a fraud contrary to the provisions of RICO as well as some sort of unlawful influence of the financial markets and control of North Central. The complaint asserts a damage claim of $1.62 billion "plus costs and disbursements and multiplied according to law." In view of the treble damage provisions of RICO, the complaint appears to seek damages exceeding $4.86 billion.

It appears that plaintiff seeks damages allegedly due to the decrease in value of the classes of stock he held in Kuntz Company as a result of the sale of North Central. The plaintiff has brought this action in his capacity as a shareholder of the Kuntz Company on behalf of Kuntz Company and in his own right.

The plaintiff previously brought an action against these defendants in the United States District Court for the Southern District of New York. The District Court dismissed the complaint on the grounds the plaintiff lacked standing to assert either a direct or derivative claim and that the court lacked pendant jurisdiction over the state claims. The United States Supreme Court denied plaintiff's motion to direct the clerk of the United States Court of Appeals for the Second Circuit to file a petition for a writ of certiorari.

The law is well settled that a shareholder has no right to bring an action in his own name and in his own behalf for a wrong committed against the corporation even though the particular wrong may have resulted in a depreciation or destruction of the value of the corporate stock (*Fifty State*

Management Corp. v. *Niagara Permanent Savings and Loan Association,* 58 AD2d 177, 179). Exceptions to this rule have been recognized where the wrongdoer has breached a duty owed to a shareholder independent of any duty owing to the corporation (*Abrams* v. *Donati,* 66 NY2d 951, 953).

Plaintiff relies on *Independent Investor Protective League* v. *Time, Inc.,* 50 NY2d 259, as authority for maintaining this action. However, the issue decided therein was that a shareholder derivative action may be maintained even though commenced after the subject corporation has effected a dissolution and distributed its assets (*id.* at 261). This action was against Time, Inc. which acquired Sterling, and the officers and directors of Sterling and alleged that Sterling at the behest of Time engaged in a course of mismanagement which depressed the value stock enabling Time to acquire Sterling at a price below its true value.

In the matter herein, the facts are inapposite to the facts in *Independent Investors,* supra. The plaintiff herein is not suing officers and directors of Kuntz Co. for mismanagement affecting shareholders' value but suing to recover for damage to Kuntz Co. Therefore, this court does not find any exception to the general rule that a shareholder has no right to maintain an action in his own behalf for depreciation or loss of value of the corporate stock. Thus the action herein must be dismissed due to lack of standing.

Furthermore, this court finds that this action is barred by res judicata in view of the District Court decision which is now final and binding.

CPLR Section 3013 provides that "Statements in a pleading shall be sufficiently particular to give the court and

the parties notice of the transaction, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." The complaint herein fails to satisfy the requirements of CPLR Section 3013 and must be dismissed (*Peri* v. *State of New York,* 66 AD2d 949, affd. 48 NY2d 734).

Defendants' motions to dismiss are granted. Defendants submit orders on notice without costs.

Dated: Ticonderoga, New York
May 19th, 1989

/s/ Dominick J. Viscardi
J. S. C.